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FILED
JUN 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 8, Original

IN THE

Supreme Court of the United States

October Term, 1981

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

ANSWERING BRIEF OF THE STATES OF ARIZONA, CALIFORNIA, AND NEVADA AND THE OTHER CALIFORNIA DEFENDANTS TO THE EXCEPTIONS AND SUPPORTING MEMORANDUM OF THE UNITED STATES AND THE CHEMEHUEVI, COCOPAH, COLORADO RIVER, FORT MOJAVE, AND QUECHAN INDIAN TRIBES.

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ANSWERING BRIEF OF THE STATES OF ARIZONA, CALIFORNIA, AND NEVADA AND THE OTHER CALIFORNIA DEFENDANTS TO THE EXCEPTIONS AND SUPPORTING MEMORANDUM OF THE UNITED STATES AND THE CHEMEHUEVI, COCOPAH, COLORADO RIVER, FORT MOJAVE, AND QUECHAN INDIAN TRIBES.

The United States, with the concurrence of the five Indian Tribes, has filed four Exceptions to the Report of Special Master Elbert P. Tuttle. The State Parties hereby answer those Exceptions as follows:

FIRST EXCEPTION: The State Parties agree with the United States that boundary lands within the "checkerboard

area" of the Fort Mojave Reservation should be treated the same as other "boundary lands" in this case. That is, the State Parties contend that such lands should not be assigned water rights until and unless their boundaries are finally determined and that unilateral actions by the Secretary of the Interior on behalf of the United States, a party to the lawsuit, utterly fail to qualify as such final determinations. Moreover, the prospect of the United States purporting to rule in the future that such checkerboard lands are within the Fort Mojave Reservation, at which time the irrigable portions of such lands automatically qualify for water rights, merely underscores the outrageous denial of due process to the State Parties that such a result would entail. With a stroke of a pen, the United States could unilaterally decide whether 641 gross irrigable acres are or are not entitled to water rights. However arbitrary, capricious, or merely wrong that decision *might* be, no other party to this lawsuit would have any legal recourse to challenge it. The United States' argument on the finality of boundaries must be rejected.

SECOND EXCEPTION: The State Parties agree with the United States that the question of reserved water rights for reservation lands alienated to non-Indians after the establishment of the reservations should not be foreclosed by a casual provision in the Special Master's proposed Decree. The State Parties therefore accept the substitute provision offered by the United States.

THIRD EXCEPTION: The State Parties have no objection to adding provisions so as to conform to the 1979 Decree. However, the United States has misstated the so-called subordination clause (which was stipulated to by all parties) of the 1979 Decree by saying that *all* Indian Reservation diversion rights are to be satisfied first in times of shortage, irrespective of priority date (except for Miscel-

laneous Present Perfected Rights). The subordination clause of the 1979 Decree applies *only* to: 1) Indian reservation rights *then* recognized in Article II(D)(1-5); and 2) any additional rights recognized as the result of the final determination of reservation boundaries.[1] The subordination clause says nothing whatsoever about additional rights recognized for so-called "omitted lands." In fact, this Court inquired about the absence of any such language during oral argument in October 1978:

> "Q. [Justice Stewart] That takes care, however, of only one part of the Indians' claims to greater reservations of water, does it not? One was the effect of new boundaries, and the other was the effect of a mistake stemming from failure of zealous representation by the United States or from whatever cause in the original allocation of irrigable acreage; is that not right?
>
> "MR. NOBLE: That is true, Your Honor. We have excluded these from the subordination agreement because we have taken the position that recalculation of irrigable acreage for the lands that existed in the reservations, that were recognized as reservation lands in 1964, is barred by *res judicata* because the Indians were adequately represented and because the issues were fully litigated at that time.

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[1] "(5) In the event of a determination of insufficient mainstream water to satisfy present perfected rights pursuant to Art. II(B)(3) of said Decree, the Secretary of the Interior shall, before providing for the satisfaction of any of the other present perfected rights except for those listed herein as 'MISCELLANEOUS PRESENT PERFECTED RIGHTS' (rights numbered 7-21 and 29-80 below) in the order of their priority dates without regard to State lines, first provide for the satisfaction in full of all of the Chemehuevi Indian Reservation, Cocopah Indian Reservation, Fort Yuma Indian Reservation, Colorado River Indian Reservation, and the Fort Mojave Indian Reservation as set forth in Art. II(D)(1)-(5) of said Decree, provided that the quantities fixed in paragraphs (1) through (5) of Art. II(D) of said Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." (1979 Decree.)

"We also feel that these claims are basically limitless claims. I think the various submissions we have here have so many different figures and such huge claims that we felt we simply could not subordinate to something like that." (Transcript, pp. 8-9 — Oral Argument 10-9-78.)

The State Parties have never consented to subordinate any of our prior rights to any reservation rights for "omitted lands" and decline to do so now. We contend that it is not proper to even award rights for such lands, much less to subordinate any of our priorities to them. We therefore agree to the United States' additional provisions only if paragraph B is modified so as to reflect the actual language of paragraph (5) of the 1979 Decree. This should be done simply by striking all language following "January 9, 1979 (439 U.S. 419, 421-423)," so that paragraph B would read:

"B. The provisions of Introductory Paragraphs (1) through (5) of the Decree entered herein January 9, 1979 (439 U.S. 419, 421-423)."

FOURTH EXCEPTION: We agree with the United States as to the necessity of listing Indian reservation water rights according to State and priority date for particular acreage. We also anticipate that we will be able to agree with the other parties as to those allocations.

Respectfully submitted,

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